

change. It can also reduce the inefficiency of both parties attempting to exercise market power by charging prices above cost, in what is often called “double marginalization.”⁵¹⁰ Each of these inefficiencies will result in higher consumer prices, and eliminating the inefficiencies therefore can lower prices.

158. *Resources.* Vertical integration makes available to programming networks the capital resources of large cable operators. Since only the large cable operators tend to be vertically integrated, this can offer programmers significant financial resources, potentially facilitating the development of a greater quantity of programming and higher quality programming. This is particularly important to new networks, which usually incur losses for the first several years of operation.⁵¹¹ In addition, vertical relationships allow programming networks access to creative and management resources at the cable operators, which may increase the efficiency of operation at the networks. Finally, cable operators have a direct relationship with subscribers, and access to this relationship through vertical integration may give programmers better knowledge about consumer demand.

159. *Signaling Commitment.* Signaling commitment is the commitment to carry a network, perhaps even before it launches. Vertical integration creates at least the appearance of signaling commitment, which may allow new programmers access to capital from sources other than the affiliated MVPD and the ability to acquire talent and content. Absence of signaling commitment may cause networks to exit the market, or never to enter the market in the first place. Thus, vertical integration may reduce the risk of failure for new networks, thereby increasing program diversity.

160. Vertical integration can be particularly beneficial in the development and launch of local and regional programming.⁵¹² Incumbent cable operators, with their direct connection to local communities, experience in ownership of programming, and large financial resources, may be uniquely positioned to develop and distribute local and regional programming. For instance, in response to the Commission’s 2002 Competition Report Notice of Inquiry, AT&T claimed that with increased clustering, it was able to develop and offer more local and regional programming to consumers.⁵¹³ Additionally, upgrades to cable systems are allowing operators to expand channel capacity, which facilitates inclusion of local and regional programming in cable system offerings.

⁵¹⁰ Double marginalization occurs when both the license fee that a programmer charges a cable operator, and the retail rate charged by the cable operator to subscribers, are set above cost. This will cause the operator to set its subscription rate higher than the most efficient level, thus reducing subscription levels and reducing total revenue to both the operator and the programmer. Joint ownership is one means of eliminating this problem. See Waterman and Weiss at 48-49.

⁵¹¹ One example of this is the Radio One-Comcast partnership to launch a network to compete with Black Entertainment Television. Krissah Williams, *Radio One, Comcast in Cable Deal*, WASHINGTON POST, Jan. 13, 2003, at A1.; see also Krissah Williams, *Comcast Alliance May Be Key to Cable Channel’s Success*, WASHINGTON POST, Jan. 15, 2003, at E1.

⁵¹² See 9th Annual Report, 17 FCC Rcd at 26957 ¶ 128; 2002 Program Access Order 17 FCC Rcd at 12132, 12148-49 ¶¶ 19, 54 (most regional programming networks are vertically integrated).

⁵¹³ See 9th Annual Report, 17 FCC Rcd at 26956 ¶ 127. MVPD competitors responded in the record that such clustering was allowing anticompetitive behavior by cable incumbents, such as migrating local and regional programming to terrestrial delivery so that the incumbent could deny downstream rivals access to the programming. *Id.* at 26956-57 ¶ 128.

161. We lack record evidence concerning the actual benefits of vertical integration, and we seek comment on whether there are benefits from vertical integration, and in particular whether and how much vertical integration has increased the flow of programming. We ask whether there are means of directly measuring these benefits, such as the added resources gained by programmers from vertical integration, and the reduction in double-marginalization. We also ask what metrics to use to measure the resulting benefits to consumers, such as the increase in programming. We ask what information and data would be needed to calculate these benefits.

162. In sum, on the record before us, we lack the evidence necessary under *Time Warner II* to establish a firm channel occupancy limit that would both preserve the benefits of vertical integration and protect against potential harms without unduly burdening cable operators' First Amendment rights. We seek additional evidence or suggested approaches that would support a specific limit in light of current market conditions, consistent with the statutory obligation to establish a reasonable limit on the number of channels that a cable operator may occupy with video programming in which the operator has an attributable interest.

E. Diversity of Information Sources

163. Section 612(g) of the Communications Act provides that at such time as cable systems with 36 or more activated channels are available to 70% of households within the United States and are subscribed to by 70% of those households, the Commission may promulgate any additional rules necessary to promote diversity of information sources.⁵¹⁴ In its *Eleventh Annual Report*, the Commission surveyed available data sources to determine whether this threshold has been met.⁵¹⁵ The Commission found that cable systems with 36 or more channels are available to 79.8% (84,415,707 ÷ 105,842,000) of occupied households.⁵¹⁶ Thus, the first 70% threshold has been met. Using various data sources, the Commission found that the second 70% threshold has not been met. The values derived from those data sources ranged from 54.7% to 68.9%.⁵¹⁷ In our annual Video Competition Report proceedings, we will continue to assess whether the 70/70 threshold has been met. We seek comment in this proceeding on whether Section 612(g) would provide an independent or complementary statutory basis to limit cable operators' horizontal or vertical ownership interests, should we determine that the threshold has been met. Finally, if Section 612(g) is deemed to provide additional statutory grounds for imposing cable ownership limits, what actions, if any, could be supported on the basis of Section 612(g) that could not be accomplished based solely on our jurisdiction under Section 613(f)?

⁵¹⁴ 47 U.S.C. § 532(g).

⁵¹⁵ See *11th Annual Report*, 20 FCC Rcd at 2767-68 ¶ 20.

⁵¹⁶ *Id.* The Commission found that as of June 2004 there were 105,842,000 total occupied homes in the U.S., and that 84,415,707 occupied homes were passed by cable systems with 36 or more channels. The relevant data sources are discussed in detail in the *11th Annual Report*. See *id.* at 2767-68 ¶ 20 and nn.40-41.

⁵¹⁷ See *id.* at 2767-68 ¶ 20.

III. PROCEDURAL MATTERS

A. Comment Information

164. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

B. Regulatory Flexibility Act

165. As required by the Regulatory Flexibility Act,⁵¹⁸ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this *Second Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Second Further Notice of Proposed Rulemaking*, and they should have a separate and distinct heading designating them as responses to the IRFA.

C. Paperwork Reduction Act

166. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

D. Ex Parte Information

167. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules.⁵¹⁹

168. *Contact Information.* The Media Bureau contact for this proceeding is Barbara Esbin or Patrick Webre at (202) 418-7200. Press inquiries should be directed to Rebecca Fisher at (202) 418-2359, TTY: (202) 418-7365 or (888) 835-5322.

⁵¹⁸ *See* 5 U.S.C. § 604.

⁵¹⁹ *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

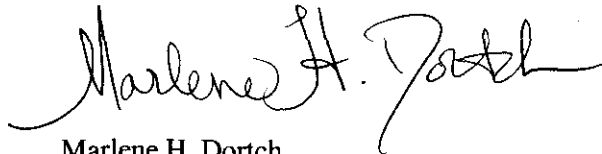
IV. ORDERING CLAUSES

169. Accordingly, IT IS ORDERED, that pursuant to authority contained in sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, and 533, this *Second Further Notice of Proposed Rulemaking* IS ADOPTED.

170. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, and 533, NOTICE IS HEREBY GIVEN of the proposals described in this *Second Further Notice of Proposed Rulemaking*.

171. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Marlene H. Dortch", is written over a horizontal line.

Marlene H. Dortch
Secretary

APPENDIX A

LIST OF COMMENTERS

INITIAL COMMENTS

Alexander Raskovich, Economist

Altrio Communications, Inc. et al. ("CMVPDs") [jointly filed on behalf of Altrio Communications, Inc., BellSouth Entertainment, LLC, the Independent Multi-Family Communications Council, Qwest Broadband Services, Inc., the Wireless Communications Association International, Inc.]

AT&T Broadband ("AT&T")

Broadband Service Providers Association ("BSPA")

Cablevision Systems Corporation ("Cablevision")

Comcast Corporation ("Comcast")

Concerned Consumers*

Consumer Federation of America, *et al.* ("CFA") [jointly filed by the following: Alliance for Community Media, Association for Independent Video and Filmmakers, Center for Digital Democracy, Consumer Federation of America, Consumers Union, Media Access Project, National Alliance for Media Arts and Culture, and the United Church of Christ, Inc.]

National Cable & Telecommunications Association ("NCTA")

Media General, Inc. ("Media General")

National Association of Broadcasters ("NAB")

Paxson Communications Corporation ("Paxson")

Progress & Freedom Foundation ("PFF")

RCN Telecom Services, Inc. ("RCN")

Sherjan Broadcasting Co., Inc. ("Sherjan")

Time Warner Cable ("Time Warner")

United States Conference of Catholic Bishops ("USCCB")

Viacom, Inc. ("Viacom")

Writer's Guild of America ("Writer's Guild")

* late filed

REPLY COMMENTS

AT&T Broadband ("AT&T")

Comcast Corporation ("Comcast")

Consumer Federation of America, *et al.* ("CFA") [jointly filed by the following: Alliance for Community Media, Association for Independent Video and Filmmakers, Center for Digital Democracy, Consumer Federation of America, Consumers Union, Media Access Project, National Alliance for Media Arts and Culture, National Association of Telecommunications Officers and Advisors, and the United Church of Christ, Inc.]

Fox Entertainment Group *et al.* ("Fox") [jointly filed by the following: Fox Entertainment Group, Inc., National Broadcasting Company, Inc., the Walt Disney Company, and Viacom, Inc.]

Media Access Project et al. ("MAP") [jointly filed by the following: Center for Digital Democracy, Consumer Federation of America, Consumers Union, and Media Access Project]

National Association of Broadcasters ("NAB")

National Cable & Telecommunications Association ("NCTA")

Paxson Communications Corporation ("Paxson")
RCN Telecom Services, Inc. ("RCN")
Time Warner Cable ("Time Warner")
United States Department of Justice ("DOJ")
World Satellite Network, Inc. ("World Satellite")
Writer's Guild of America ("Writer's Guild")

INITIAL COMMENTS ON EXPERIMENTAL STUDY ("SUPPLEMENTAL COMMENTS")

AT&T Corporation ("AT&T")
Comcast Corporation ("Comcast")
National Cable & Telecommunications Association ("NCTA")
RCN Telecom Services, Inc. ("RCN")
SBC Communications, Inc. ("SBC")
Time Warner Cable ("Time Warner")

REPLY COMMENTS ON EXPERIMENTAL STUDY ("SUPPLEMENTAL REPLY COMMENTS")

AT&T Corporation ("AT&T")
Time Warner Cable ("Time Warner")

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the *Second Further Notice of Proposed Rulemaking (Second Further Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to this IRFA and must be filed by the deadlines for comments provided on the first page of this document. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *Second Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. Section 613(f) of the Communications Act is intended, in part, to foster a diverse, robust, and competitive market in the acquisition and delivery of multichannel video programming. Specifically, Section 613(f) requires the Commission to establish reasonable limits on the number of cable subscribers that may be reached through commonly owned or attributed systems (horizontal limits) and on the number of channels that can be occupied by the cable system's owned or attributed video programming services (vertical limits). Congress intended these limits to ensure that cable operators do not use their horizontal reach in the multichannel video distribution (MVPD) market, acting unilaterally or jointly, to unfairly impede the flow of video programming to consumers. However, Congress recognized that multiple system ownership could benefit consumers by allowing efficiencies in the administration, distribution, and procurement of programming, and by providing capital and a ready subscriber base to promote the introduction of new programming services. Pursuant to its statutory mandate, and balancing these competing interests, the Commission has adopted and periodically revised cable ownership limits.

3. The Commission first established horizontal and vertical ownership limits in 1993.⁴ The horizontal limit bars cable operators from serving more than 30% of all U.S. MVPD subscribers. The vertical limit bars cable operators with 75 or fewer channels from devoting more than 40% of channel capacity to affiliated programming. In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II*), the D.C. Circuit remanded the Commission's horizontal and vertical limits, finding that the horizontal and vertical ownership limits unduly burdened cable operators' First Amendment rights, that the Commission's evidentiary basis for imposing the ownership limits and its

¹ See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

² See 5 U.S.C. § 603(a).

³ *Id.*

⁴ See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions*, 8 FCC Rcd 8565, 8567 ¶¶ 3-4 (1993) (1993 *Second Report and Order*).

rationales supporting the vacated attribution rules did not meet the applicable standards of review, and that the Commission had failed to consider sufficiently changes that have occurred in the MVPD market since passage of the 1992 Act. The Commission thereafter issued a *Further Notice of Proposed Rulemaking* (2001 *Further Notice*) soliciting comment aimed at establishing a sound record on which to base cable horizontal and vertical limits.⁵

4. None of the comments to the 2001 *Further Notice* yielded a sound evidentiary basis for setting horizontal or vertical limits. While many commenters presented theoretical, legal, or economic arguments and anecdotal evidence, no party provided a compelling approach that supported a particular horizontal or vertical limit. The Commission subsequently sought to augment the record by means of a programming network survey and econometric analysis, with limited results. The Commission concludes that a *Second Further Notice* is necessary to update the record and provide additional input on horizontal and vertical ownership limits so that the Commission may comply with the statutory mandate and the court's directives.

5. In the *Second Further Notice*, the Commission seeks comment on how recent developments in the industry may affect the issues before us. Additionally, to develop a more focused and useful record, the Commission addresses the viability of proposals for setting limits suggested in the record.

B. Legal Basis

6. The authority for the action proposed in this rulemaking is contained in Sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, 533.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

7. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that will be affected by the rules.⁶ The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.⁸ Under the Small Business Act, a "small business concern" is one

⁵ See *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 (2001) (2001 *Further Notice*). The Initial Regulatory Flexibility Analysis for the 2001 *Further Notice* is at 16 FCC Rcd at 17360-17369.

⁶ 5 U.S.C. § 603(b)(3).

⁷ 5 U.S.C. § 601(6).

⁸ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹

8. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed a small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually.¹⁰ According to the Census Bureau data for 1997, there were 1,311 firms in this category, total, that operated for the entire year.¹¹ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies in the *Second Further Notice*. We note, however, that the ownership rules at issue here apply only to cable operators, and not other MVPD providers.

9. *Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA's approval, our own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.¹² We last estimated that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.¹³ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small cable companies that may be affected by the adopted rules.

10. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁴ The Commission has determined that there are 67.7 million

⁹ 15 U.S.C. § 632.

¹⁰ 13 C.F.R. § 121.201, NAICS Code 517510.

¹¹ U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

¹² 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable company is one with annual revenues of \$100 million or less. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Doc. Nos. 92-266 and 93-215, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408-7409 ¶¶ 28-30 (1995).

¹³ Paul Kagan Assocs., Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁴ 47 U.S.C. § 543(m)(2).

subscribers in the United States.¹⁵ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.¹⁶ Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.¹⁷ The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,¹⁸ and therefore is unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act.

11. *Private Cable Operators (PCOs) or Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for cable and other program distribution services includes PCOs.¹⁹ In 2003, there were approximately 250 PCOs operating in the United States. PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers.²⁰ As of June 2004, PCOs served 1.1 million subscribers, down 100,000 subscribers from June 2003.²¹ Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

12. None proposed.

¹⁵ See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (2001).

¹⁶ 47 C.F.R. § 76.901(f).

¹⁷ See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (2001).

¹⁸ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 U.S.C. § 573.

¹⁹ 13 C.F.R. § 121.201, NAICS Code 517510. Small entities are defined as all such companies generating \$12.5 million or less in annual receipts. *Id.*

²⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1666 ¶ 90 (2004).

²¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2816 ¶ 110 (2005).

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

13. The RFA requires an agency to describe any significant alternatives specifically affecting small entities that it has considered in proposing regulatory approaches, which may include, among others, the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²²

14. The cable ownership limits are intended to prevent large cable entities from unfairly impeding the flow of video programming to consumers through their horizontal reach and/or their vertical integration. Any horizontal or vertical limits adopted by the Commission would directly impact large cable entities, and we anticipate that they will have little adverse impact on small entities. The *Second Further Notice* discusses several potential scenarios in which small entities may suffer harm from large entities, either through their horizontal reach, their vertical integration, or both, and seeks comment on crafting rules that prevent harms to small entities, which could, in turn, protect the flow of programming to consumers.

F. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

15. None.

²² 5 U.S.C. § 603(c).

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN**

Re: *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Second Further Notice of Proposed Rulemaking, CS Docket No. 98-82 et al.

It is with some disappointment that we vote to approve today's *Second Further Notice of Proposed Rulemaking*. After the D.C. Circuit reversed our prior rules, the Commission sought public comment, in September 2001, on how to fashion new standards, consistent with the court's opinion. Now, almost four years later, we still do not resolve these issues and provide much-needed certainty, but instead seek another round of comments. The record we adduced before, limited though it was, has grown stale, and needs to be refreshed and updated.

Once the new record is compiled, we hope the Commission will prioritize this proceeding and move to a decision. Toward that end, we're pleased that today's item, even if it does not establish new numerical limits, does resolve some issues. Most importantly, the item puts to rest the notion that the Commission could simply decide that horizontal and vertical limits of some kind aren't necessary. The item reiterates the clear language of the law: the Commission "shall . . . prescribe rules and regulations establishing reasonable limits" for a cable operator's subscriber reach, as well as the number of its own channels it can run on its system. Against this backdrop, we hope cable operators and other parties do not argue that there should be no numerical limits, but instead provide appropriate and necessary information to help us implement the clear command of the statute. Given that the mandate dates back not to the now almost ten-year-old Telecommunications Act of 1996, but even worse, the Cable Television Consumer Protection and Competition Act of 1992, we need to work efficiently and productively to establish numerical limits which satisfy the statutory purposes expressed in section 613(f)(2) of the Act as soon as possible.